REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU
Criminal Appeal 172, 173, 174 & 175 of 2009

JOHN NDUNGU THUMBI.....1ST APPELLANT

DAVID NGUNJIRI.....2ND APPELLANT

DAVID NDEGWA MWANGI.....3RD APPELLANT

DAVID MUGO MWANGI.....4TH APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

JOHN NDUNGU THUMBI, DAVID NGUNJIRI, DAVID NDEGWA MWANGI and DAVID MUGO MWANGI, the Appellants were charged with the offence of arson contrary to Section 332(a) of the Penal Code. The particulars of the charge against them were that on 18th January 2005 at Kihoto Farm in Nakuru District within Rift Valley Province, jointly with others not before court, they willfully and unlawfully to John Maina Mungai's buildings valued at Kshs.1.2 million. They denied the charge but after trial they were convicted and sentenced to pay a fine of Kshs.100,000/= and in default to serve seven months imprisonment. Though they have served the sentence, they have appealed against both the conviction and sentence.

In the 12 grounds of appeal, counsel for the Appellants has raised four points, namely, that the trial was vitiated by failing to comply with Section 211 of the Criminal Procedure Code; that the alleged identification of the Appellants as the arsonists could not be relied on; that the learned trial magistrate erred in disregarding the Appellants' defences and that the convictions were based on contradicted evidence.

Arguing these grounds of appeal on behalf of all the Appellants, Mr Kahiga submitted that at the close of the prosecution case, the learned trial magistrate erred in failing to call the Appellants to defend themselves and explaining to them the provisions of Section 211 of the Criminal Procedure Code. He said as that provision is mandatory, that rendered the trial defective. On ground two he submitted that although the offence was committed in broad day light and the complainant and the Appellants knew each other, given the prevailing circumstances at the scene, that is the shouting and throwing of stone, nobody could be able to identify the arsonists. He cited the case of Kiarie Vs Republic, [1984] KLR 739 for the proposition that mistakes do occur in the identification of even close friends or relatives. He said the witnesses could not distinguish between the arsonists and those who went to put off the fire. The complainant was hysterical. He dismissed the evidence of PW3 as malicious because the first Appellant had reported him as being corrupt and there is a civil case on that allegation. Given the prevailing circumstances, he said an identification parade should have been held and failure to do that was fatal to the prosecution case.

On ground 3, Mr Kahiga submitted that the learned trial magistrate erred in ignoring the alibi defences in which the Appellants even called

witnesses. In conclusion he submitted that there was no sufficient evidence to support the Appellants' convictions and that the learned trial magistrate took into consideration extraneous matters.

Opposing the appeal Mr. Mugambi, learned State Counsel submitted that the trial was not defective as alleged. Immediately after the close of the prosecution case, the defence counsel stood up and said he was ready with the defence case and that the Accused persons would testify on oath. He said the trial magistrate considered the alibi defences and correctly dismissed them. He dismissed the accusation that the trial magistrate took into account extraneous matters as there is clear evidence of a land dispute between the complainant and members of Kihoto Farm. He urged me to dismiss this appeal.

I have considered these submissions and carefully read the record of appeal. The claim that the trial was vitiated by the learned trial magistrate's failure to comply with Section 211 of the Penal Code has no basis. The purpose of that Section is to inform accused persons that after the prosecution has closed its case the court finds that they have a case to answer and to explain to them their rights and the options they have in conducting their defences. In this case, the Appellants were represented by Mr. Kahiga. As the learned State Counsel said, immediately after the close of the prosecution case, he stood up and said he did not wish to make any submissions at that stage and that he was ready with the defence case and that the Accused persons would testify on oath. Clearly, Mr. Kahiga saw that the Appellants had a case to answer and had even discussed with them their line of defence. In those circumstances, it would, in my opinion been otiose for the learned trial magistrate to go over the motion of explaining to the Appellants the meaning and purpose of Section 211 of the Criminal Procedure Code. I accordingly find that that failure did not occasion a failure of justice and I therefore dismiss that ground of appeal.

The second ground of appeal is on identification. It is common ground that the complainant and the Appellants having lived together on the same farm for many years knew each other well. In their evidence, the Appellants themselves said that. It is also not in dispute that the offence was committed in broad daylight at about 11.00 am. The complainant even pleaded with the arsonists to let him take the money that was in the burning house and PW2 heard that. PW1, PW2 and PW3 identified not only the Appellants but also other people as being in the group of the arsonists. PW3 even called the 1st, 2nd and 3rd Appellants by name and pleaded with them in vain not to burn the complainant's house.

The Appellants themselves said the prior to this incident, they had no problem with the complainant. They also gave no reason whatsoever why PW2 would fabricate such a serious criminal charge against them. That the 1st Appellant had alleged that the police officer, PW3 was corrupt has no bearing in this case. Together with the other Appellants, he had been seen by PW1 and PW2 among the group of people who set the buildings ablaze. Like the learned trial magistrate, I am satisfied that the Appellants were properly identified as being among the arsonists. That finding obviously displaced their alibi defences. The learned trial magistrate considered those defences and correctly dismissed them.

The reason for the touching of the complainant's home was because of the allegation that he was not a member of Kihoto Farmers Company Ltd and that he had illegally occupied land on that company's farm. What then is extraneous about the learned trial magistrate mentioning that dispute?

On the whole I find that the Appellants were convicted on sound evidence and I accordingly dismiss their appeals against conviction.

Given the wantom destruction of the complainant's entire homestead, the sentence meted out to the Appellants was quite lenient. I therefore dismiss their appeals against sentence as well.

In the upshot I dismiss these appeals in their entirety.

DATED and DELIVERED at Nakuru this 7th day of May, 2010.

D. K. MARAGA

JUDGE.